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Human Rights Council
Expert Mechanism on the Rights of Indigenous Peoples
Eighth session
20–24 July 2015
Item 2 of the provisional agenda
Adoption of the agenda and organization of work

Provisional agenda

1. Election of officers.
2. Adoption of the agenda and organization of work.
3. Follow-up to the World Conference on Indigenous Peoples, including the review of the mandate of the Expert Mechanism.
4. Panel discussion on indigenous peoples' human rights in relation to business enterprises.
5. Post-2015 development agenda and indigenous peoples' rights.
6. Follow-up to thematic studies and advice.
7. Study and advice on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage.
8. United Nations Declaration on the Rights of Indigenous Peoples.
9. Proposals to be submitted to the Human Rights Council for its consideration and approval.
10. Adoption of the report.

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Addendum

Annotations

1. Election of officers

Pursuant to paragraph 11 of General Assembly resolution 60/251, the Human Rights Council applies the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council (A/520/Rev.17). On the election of officers, rule 103 of the rules of procedure states that each committee should elect a Chairperson, one or more Vice-Chairpersons and a Rapporteur.

2. Adoption of the agenda and organization of work

The Expert Mechanism will have before it the provisional agenda of the eighth session (A/HRC/EMRIP/2015/1) and the annotations contained herein. The Expert Mechanism will adopt the agenda, including any revisions it might wish to make.

In its resolution 6/36, the Human Rights Council decided that the Expert Mechanism should meet once annually, for three days in its first year and thereafter for up to five days, and that the sessions may be a combination of open and private meetings. For its eighth session, the Expert Mechanism will meet for five days, from 20 to 24 July 2015.

Rule 99 of the rules of procedure of the General Assembly provides that each committee should, at the beginning of the session, adopt a programme of work indicating, if possible, a target date for the conclusion of its work, the approximate dates of consideration of items and the number of meetings to be allocated to each item. Accordingly, the Expert Mechanism will have before it for consideration and approval a draft timetable prepared by the secretariat showing the order and distribution of meeting times for each agenda item for the eighth session.

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3. Follow-up to the World Conference on Indigenous Peoples, including the review of the mandate of the Expert Mechanism

The high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples was held on 22 and 23 September 2014. In the outcome document of the meeting, the Assembly invited the Human Rights Council, taking into account the views of indigenous peoples, to review the mandates of its existing mechanisms, in particular the Expert Mechanism, with a view to modifying and improving it so that it can more effectively promote respect for the United Nations Declaration on the Rights of Indigenous Peoples, including by better assisting Member States to monitor, evaluate and improve the achievement of the ends of the Declaration (Assembly resolution 69/2, para. 28).

Under agenda item 3, the Expert Mechanism and observers will discuss follow-up to the World Conference, in particular in the context of paragraph 28 of the outcome document.

4. Panel discussion on indigenous peoples' human rights in relation to business enterprises

At its seventh session, the Expert Mechanism decided to hold, during its eighth session, a panel discussion on indigenous peoples' human rights in relation to business enterprises. The panel discussion will build on the previous work of the Expert Mechanism in this area, including its follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries (A/HRC/21/55).

5. Post-2015 development agenda and indigenous peoples' rights

At its seventh session, the Expert Mechanism decided to include in the provisional agenda of its eighth session a discussion on the post-2015 development agenda and indigenous peoples' rights.

Given that the summit to adopt the post-2015 development agenda is scheduled to be held in September 2015, under agenda item 5 the Expert Mechanism and observers will discuss how indigenous peoples' rights can be incorporated into the post-2015 development agenda.

6. Follow-up to thematic studies and advice

At its eighteenth session, the Human Rights Council welcomed the practice adopted by the Expert Mechanism of devoting specific time to the discussion of updates relevant to past mandated thematic studies of the Expert Mechanism, recommended that the Expert Mechanism should adopt this practice on a permanent basis and encouraged States to continue to participate in and contribute to these discussions (Council resolution 18/8, para. 5).

Under agenda item 6, the Expert Mechanism will consider follow-up to its previous studies.

7. Study and advice on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage

At its twenty-seventh session, the Human Rights Council requested the Expert Mechanism to prepare a study on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, including through participation in political and public life, and to present it to the Council at its thirtieth session (Council resolution 27/13, para. 5).

Accordingly, the Expert Mechanism prepared a study on the issue (A/HRC/EMRIP/2015/2). To contribute to the study, and following the practice adopted for its previous studies, the Expert Mechanism sent out a call for submissions and examined the issue in greater detail at an expert seminar.

Under agenda item 7, the Expert Mechanism and observers will make comments and suggestions on the draft study. The Expert Mechanism will subsequently finalize the study and submit it to the Council at its thirtieth session.

8. United Nations Declaration on the Rights of Indigenous Peoples

In its resolution 6/36, the Human Rights Council recalled that, at its sixty-first session, the General Assembly, in its resolution 61/295, had adopted the United Nations Declaration on the Rights of Indigenous Peoples. In the report of the Expert Mechanism on its first session, the Declaration was unanimously seen as a vital instrument providing a normative framework to guide the work of the Expert Mechanism (see A/HRC/10/56, para. 23).

At its twenty-seventh session, the Human Rights Council requested the Expert Mechanism to continue to undertake, with the assistance of the Office of the United Nations High Commissioner for Human Rights, the questionnaire survey to seek the views of States and indigenous peoples on best practices regarding possible appropriate measures and implementation strategies in order to attain the end goals of the Declaration (Council resolution 27/13, para. 6). The results of the questionnaire survey have been compiled by the Expert Mechanism in a draft report.

Under agenda item 8, the Expert Mechanism will hold a general discussion on the Declaration, as well as a focused discussion on the use of the Declaration to promote and protect the rights of indigenous peoples. It will also discuss the results of the questionnaire with a view to finalizing the draft report, which will then be submitted to the Human Rights Council at its thirtieth session.

9. Proposals to be submitted to the Human Rights Council for its consideration and approval

Pursuant to Human Rights Council resolution 6/36, the Expert Mechanism may make proposals to the Council for its consideration and approval, within the scope of its work as set out by the Council. This may include proposals on how its thematic expertise could assist the Council in the implementation of its mandate and mechanisms.

10. Adoption of the report

The Expert Mechanism will adopt the report on its eighth session with a view to submitting it to the Human Rights Council at its thirtieth session.

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Human Rights Council
Expert Mechanism on the Rights of Indigenous Peoples
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Item 7 of the provisional agenda
Study and advice on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage

Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage

Study by the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In resolution 27/13 the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, including through their participation in political and public life, and to present it to the Council at its thirtieth session.

The present study offers a comprehensive analytical overview of the international legal framework and jurisprudence regarding the rights of indigenous peoples with respect to their cultural heritage, and addresses some of the specific issues for indigenous peoples when it comes to cultural heritage.

The study concludes with Expert Mechanism advice No. 8 on the cultural heritage of indigenous peoples.

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I. Introduction

1. In its resolution 27/13, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, including through their participation in political and public life, and to present it to the Council at its thirtieth session.

2. The Expert Mechanism called for submissions from States, indigenous peoples, non-State actors, national human rights institutions and other stakeholders to inform the study. The submissions received are, where permission was granted, available on the website of the Expert Mechanism.[1] The study also benefited significantly from presentations made at the Expert Seminar on Indigenous Peoples' Rights with Respect to their Cultural Heritage (Rovaniemi, Finland, 26–27 February 2015), organized by the Office of the United Nations High Commissioner for Human Rights and the University of Lapland. The Expert Mechanism appreciates the submissions and is informed by them.

3. Although the Expert Mechanism has not specifically addressed the issue of cultural heritage, it has given significant attention to the cultures of indigenous peoples (A/HRC/21/53). The present study offers a comprehensive overview of the international legal framework and jurisprudence regarding the rights of indigenous peoples with respect to their cultural heritage and addresses specific areas relating to cultural heritage.

A. Concept of cultural heritage

4. The term "cultural heritage" has evolved considerably in recent decades. While previously referring exclusively to the monumental remains of cultures, cultural heritage, as a concept, has gradually come to include new categories, particularly putting more emphasis on intangible cultural heritage. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage defines intangible cultural heritage as "the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" (art. 2). There is also increasing recognition of the relationship between communities and cultural heritage. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society defines cultural heritage as "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time" (art. 2).

5. As noted by the Special Rapporteur in the field of cultural rights, although no uniform definition exists, several international instruments and a number of references relating to traditional knowledge and traditional cultural expressions provide useful guidance for defining what is usually understood as cultural heritage. Noting that no list is exhaustive, the Special Rapporteur referred to cultural heritage as "tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic expressions, folklore) and natural heritage (e.g. protected natural reserves; other protected biologically diverse areas; historic parks

[1] See www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Studyonculturalheritage.aspx.

and gardens and cultural landscapes)". She added that cultural heritage should be understood as resources enabling the cultural identification and development processes of individuals and communities which they, implicitly or explicitly, wish to transmit to future generations.[2] Cultural heritage also includes traditional knowledge and cultural expressions.

B. Indigenous peoples and cultural heritage

6. Indigenous peoples' cultural heritage includes tangible and intangible manifestations of their ways of life, world views, achievements and creativity, and should be considered an expression of their self-determination and their spiritual and physical relationships with their lands, territories and resources. While the notion of heritage encompasses traditional practices in a broad sense, including language, art, music, dance, song, stories, traditional games and sports, sacred sites, and ancestral human remains, for indigenous peoples the preservation of heritage is deeply embedded and linked to the protection of traditional territories. Indigenous cultural heritage is a holistic and inter-generational concept based on common material and spiritual values influenced by the environment.[3] It also includes bio-cultural heritage and traditional food production systems such as rotational farming, pastoralism, artisanal fisheries and other forms of access to natural sources.[4]

7. Taking into account the various understandings of culture and cultural heritage, the Expert Mechanism proposed the following:

> Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering. Indigenous cultures are influenced by their environment, impacting on a people's common perspective of the world and underlining its connection with nature. Indigenous cultures shape their views of the world and life. (A/HRC/21/53, para. 52)

8. It is important to acknowledge that the traditional categorization of heritage as "tangible", "intangible", and "natural" demonstrates its limitations: tangible heritage carries out meanings, while intangible heritage is often embodied in specific objects. This categorization is particularly inappropriate in the case of indigenous peoples. It is important to adopt a holistic approach to cultural heritage and acknowledge that the watertight legal regime of protection for cultural heritage could be problematic for indigenous peoples.

II. Review of the international legal framework on the rights of indigenous peoples with respect to their cultural heritage

9. Standards relating to the cultural heritage of indigenous peoples are dispersed in several international regimes, in particular in human rights instruments. United Nations

[2] A/HRC/17/38, paras. 4 and 6.
[3] Submission: Asia Indigenous Peoples Pact.
[4] Submission: International Indian Treaty Council.

Educational, Scientific and Cultural Organization (UNESCO) instruments, intellectual property treaties and the international environmental law and policy regime.

A. Human rights instruments

10. Culture is one of the underlying pillars of the United Nations Declaration on the Rights of Indigenous Peoples. The close relationship between the cultural rights of indigenous peoples and their right to self-determination is reflected in article 3 of the Declaration, which states that by virtue of their right to self-determination, indigenous peoples may freely pursue their cultural development. The Declaration addresses the tangible heritage, traditions and customs of indigenous peoples (art. 11); the spiritual and religious traditions and customs of indigenous cultures (art. 12); their intangible heritage (art. 13); their right to uphold the dignity and diversity of their cultures and languages, in relation to education and public information (arts. 14 and 15). More specifically, regarding cultural heritage, the Declaration states that:

> Indigenous peoples have the right to maintain, control protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. (art. 31)

11. The Declaration upholds the rights of indigenous peoples to develop their own culture and customs; to the use and control of their ceremonial objects; not to be subjected to destruction of their culture or to discrimination on the ground of their culture; and to redress mechanisms for action that deprives them of their cultural values.

12. The International Labour Organization Indigenous and Tribal Peoples Convention (No. 169) contains a number of provisions relating to the cultural heritage of indigenous peoples. Drawing attention to the distinctive contributions of indigenous peoples to the cultural diversity of humankind (preamble), the Convention requires Governments to promote and safeguard the cultures of indigenous peoples through special measures (arts. 2 and 4), and to recognize and protect their cultural values and practices (art. 5). Governments are required to respect and safeguard the cultural and traditional values of indigenous peoples and (art. 13) their use and management of the land and natural resources (arts. 14 and 15), and ensure that the traditional activities of indigenous peoples are strengthened and promoted (art. 23). Governments are required to consult with and ensure the effective participation of indigenous peoples at all levels of decision-making in political, legislative and administrative bodies and processes which may affect them directly, including their cultural development, and ensure that studies are carried out to assess the cultural, inter alia, impact of development activities on indigenous peoples (arts. 6 and 7).

13. The right of access to and enjoyment of cultural heritage forms part of international human rights law.[5] A number of international human rights instruments provide the legal basis for the right of access to and enjoyment of cultural heritage, including the Universal Declaration of Human Rights (art. 27), the International Covenant on Economic, Social and Cultural Rights (art. 15) and the International Covenant on Civil and Political Rights

[5] A/HRC/17/38

(art. 27). The obligation to respect the right to take part in cultural life "includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group … to have access to their own cultural and linguistic heritage and to that of others."[5]

14. The International Covenant on Civil and Political Rights provides for the right of members of minorities to enjoy their own culture, practice their own religion and use their own language (art. 27), while the Convention on the Rights of the Child explicitly extends that right to persons of indigenous origin (art. 30) and requires that the education of the child be directed to "the development of respect for his or her cultural identity, language and values…" (art. 29). The right of access to and enjoyment of cultural heritage must be interpreted in relation to the non-discrimination principles enshrined in many human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination (art. 2) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 13).

15. At the regional level, the African Charter on Human and Peoples' Rights guarantees the right of every individual to freely take part in the cultural life of his or her community (art. 17) and upholds the right of all peoples to their cultural development and the equal enjoyment of the common heritage of mankind (art. 22). The American Declaration of the Rights and Duties of Man states that, "since culture is the highest social and historical expression of … spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power" (preamble) and proclaims the right of every person to take part in the cultural life of the community (art. 13).

16. Overall, international and regional human rights instruments guarantee the right to take part in cultural life, the right to enjoy one's own culture, and the right to maintain, control, protect and develop one's cultural heritage.

B. United Nations Educational, Scientific and Cultural Organization, cultural heritage and indigenous peoples

17. Cultural heritage is a central part of the mandate of UNESCO. The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention), addresses both cultural heritage (for example, sacred sites, monuments or buildings) and natural heritage (such as biodiversity hotspots or outstanding geological formations), or a mixture of both.

18. More recent instruments provide greater recognition of the cultural heritage of indigenous peoples. The Universal Declaration on Cultural Diversity (2001) protects the exchange of cultural heritage, calling specifically for respect for human dignity and commitment to the human rights of minorities and indigenous peoples as a key element to defend cultural diversity (art. 4). The 2003 Convention on the Safeguarding of Intangible Cultural Heritage recognizes that "communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity" (preamble). The Operational Directives for the implementation of the Convention emphasize that State activities may only be undertaken with the active involvement or participation of the concerned communities, groups and individuals. In particular, the free, prior and informed consent of the concerned communities is required to inscribe intangible cultural heritage elements on the List of

[5] Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009), para. 50.

Intangible Cultural Heritage in Need of Urgent Safeguarding or the Representative List of the Intangible Cultural Heritage of Humanity and to include programmes, projects or activities in the register of best practices (paras. 1, 2, 7 and 101).

19. The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions refers to the obligation of States to pay "due attention" to creating an environment conducive to enabling indigenous peoples to create, produce, disseminate and access their cultural heritage through their cultural expressions (art. 7 (a)).

C. Convention on Biological Diversity and the Nagoya Protocol

20. The 1992 Convention on Biological Diversity promotes protection of the natural and cultural heritage of indigenous peoples through the conservation of biological diversity and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (arts. 1 and 19). It requires States to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity … and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" (art. 8 (j)). The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010) is particularly relevant as it requires States to uphold the established rights and customary laws of indigenous peoples and ensure their participation in the implementation of the Protocol (arts. 5 and 12). The Protocol protects access to indigenous cultural heritage by requiring States to take measures to obtain the prior informed consent and involvement of indigenous communities for access to relevant genetic resources (art. 6) and traditional knowledge (art. 7).

21. The Food and Agricultural Organization of the United Nations International Treaty on Plant Genetic Resources for Food and Agriculture, recognizing the enormous contribution of indigenous communities to food production worldwide, requires the Contracting parties to take measures to protect traditional knowledge relevant to plant genetic resources for food and agriculture (art. 9) and promote wild crops and plants by supporting the efforts of indigenous communities (art. 5).

D. World Intellectual Property Organization

22. The World Intellectual Property Organization (WIPO) has three conventions that are particularly relevant to the cultural heritage of indigenous peoples. The Berne Convention for the Protection of Literary and Artistic Works (1886) provides a mechanism to ensure international protection of anonymous, pseudonymous and unpublished works (art. 15); the Performances and Phonograms Treaty (1996) provides for international protection for performances and phonographic recordings of expressions of folklore (arts. 2 and 33); and the Beijing Treaty on Audiovisual Performances (2012), which, upon entry into force, will provide protection to performers of expressions of folklore with regard to authorizing their performances in audiovisual media.

23. In 2000, WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to serve as a forum to discuss intellectual property issues arising in the context of access to genetic resources and benefit-sharing, and protection of traditional knowledge and traditional cultural expressions. In 2009, the Committee initiated formal text-based negotiations with the objective of reaching agreement on texts of international legal instruments to ensure the

effective protection of genetic resources, traditional knowledge and traditional cultural expressions.

24. Although a multitude of legal regimes exist to protect cultural heritage, there is a lack of adequate integration in relation to the protection of the cultural heritage of indigenous peoples. Such complex and parallel systems of protection of cultural heritage leads to fragmentation within a multitude of legal frameworks, which ultimately do not adequately protect the cultural heritage of indigenous peoples. The systems fail to recognize that, for indigenous peoples, cultural heritage is holistic and encompasses their spiritual, economic and social connections to their lands and territories.

III. Overview of the jurisprudence on rights relating to cultural heritage

A. Human rights treaty bodies

25. Article 27 of the International Covenant on Civil and Political Rights protects the cultural rights of indigenous peoples. In its general comment No. 23 (1994) on the rights of minorities, the Human Rights Committee observed that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples" (para. 7). With regard to the relationship between land rights and cultural rights, the approach is that, where land is of central significance to the sustenance of a culture, the right to enjoy one's culture requires the protection of land[7] and the recognition of land rights for indigenous peoples, as reiterated in several concluding observations and individual communications of the Committee.[8] Avoiding the danger of adopting a very rigid or "frozen" approach to the definition of cultural activities, in its jurisprudence, the Committee has consistently underlined that indigenous peoples who have adapted their methods of carrying out traditional activities over the years and have incorporated the use of modern technology are not prevented from invoking protection under the Covenant.[9]

26. The Committee on Economic, Social and Cultural Rights has been particularly proactive with regard to the cultural rights of indigenous peoples.[10] In its general comment No. 21, the Committee noted as follows:

> Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. (para. 37)

27. The Committee has also expressed concern about the lack of adequate protection for and information on the intellectual property rights and cultural heritage of indigenous

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[7] Jeremie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York, Transnational Publishers Inc., 2006), p. 115.

[8] Forest Peoples Programme, *A Compilation of Treaty Body Jurisprudence, the Recommendations of the Human Rights Council and its Special Procedures and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples*, vols. I and V.

[9] See, for example, Human Rights Committee, communication No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 26 October 1994, para. 9.3.

[10] See the Committee's general comments No. 17 (2005), and No. 21 (2009).

peoples (E/C.12/RUS/CO/5, para. 34) and the restrictions to land and resources and the lack of involvement of indigenous peoples in decision-making processes regarding land rights, which pose a threat to the realization of their cultural life (E/C.12/TZA/CO/1-3, para. 29).

28. The Committee on the Elimination of Racial Discrimination made a direct connection between the cultural rights and the land rights of indigenous peoples, and between their language and their cultural heritage.[11] It recommended that States parties respect indigenous culture, history, language and way of life as an enrichment of the State's cultural identity.[12]

B. Special procedures of the Human Rights Council

29. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Erica-Irene Daes, conducted studies on the protection of the cultural and intellectual property of indigenous peoples (E/C.4/Sub.2/1993/28) and on the protection of the heritage of indigenous peoples (E/CN.4/Sub.2/1995/26). The studies considered measures to strengthen respect for the cultural and intellectual property of indigenous peoples, and included the draft principles and guidelines for the protection of the heritage of indigenous peoples,[13] which set standards for governments to ensure that the heritage of indigenous peoples survives for future generations and continues to enrich the common heritage of humanity. In 2005, it was recommended that the Working Group on Indigenous Populations open the possibility that the guidelines might at a later stage be transformed into an international legally binding instrument, for example, a convention on the protection of indigenous peoples' heritage.[14]

30. The Special Rapporteur in the field of cultural rights addressed the right of access to and enjoyment of cultural heritage for all persons and made recommendations that are relevant for indigenous peoples (A/HRC/17/38). She underlined the need to build stronger relationships between cultural institutions and communities, including indigenous peoples, and to develop good practices, building on existing initiatives (para. 16).

31. The Special Rapporteur on the rights of indigenous peoples has consistently addressed the issue of cultural heritage in thematic and country reports, documenting instances where indigenous peoples have had major concerns regarding the protection of their cultural heritage, such as the endangerment of their sacred places, heritage languages and cultures,[15] and the lack of control by indigenous peoples to establish their historical cultural heritage sites.[16] The Special Rapporteur has highlighted how the cultural heritage of indigenous peoples could be put in jeopardy when extractive industries or large-scale developmental projects invade indigenous peoples' territories,[17] and the importance of education, particularly the role of indigenous languages, in the preservation of cultural heritage.[18] In particular, the Special Rapporteur has drawn attention to the lack of inclusion

[11] Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997), also CERD/C/LAO/CO/16-18, para. 21, and CERD/C/IDN/CO/3, 2007, para. 17.
[12] CERD/C/IDN/CO/3, para. 16.
[13] E/CN.4/Sub.2/1995/26, annex.
[14] E/CN.4/Sub.2/AC.4/2005/3, para. 6.
[15] A/HRC/21/47/Add.1, para. 107.
[16] A/HRC/15/37/Add.5, para. 64.
[17] A/HRC/21/47/Add.3, para. 69; A/HRC/18/35/Add.1, para. 10; A/HRC/15/37/Add.1, para. 242.
[18] E/CN.4/2005/88/Add.4, paras. 10 and 17; E/CN.4/2006/78/Add.4, para. 26; A/HRC/4/32/Add.4, para. 33.

and participation of indigenous peoples in the nomination and management of world heritage sites under the World Heritage Convention.[19]

C. Regional human rights institutions

32. Regional courts and human rights commissions have lent robust support to the rights of indigenous peoples to their cultural heritage. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have firmly established that States should create effective mechanisms for titling and demarcating the lands, territories and resources of indigenous peoples in accordance with their customs, cultures and traditions.[20] The Court has emphasized that the close relationship between indigenous peoples and their land must be recognized and understood as the fundamental base of their culture, spiritual life, integrity, economic survival and cultural preservation.[21]

33. The African Commission on Human and Peoples' Rights has also examined the right to cultural heritage as it applies to indigenous peoples. In the Endorois decision, the Commission highlighted that Article 17 of the Charter was dual dimensional in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the State to promote and protect the traditional values recognized by a community.[22] It added that article 17 required governments to take measures aimed at the conservation, development and diffusion of culture, such as promoting cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions and promoting awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.[23]

IV. Participation of indigenous peoples in cultural heritage policies

34. Effective participation in decision-making processes relating to cultural heritage is crucial for indigenous peoples, who are often the victims of both cultural and natural heritage protection policies that fail to take their perspectives into consideration.

35. The rights to effective participation, consultation and consent are strongly expressed in several articles of the United Nations Declaration on the Rights of Indigenous Peoples.[24] Article 32 requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. This provision relates to any decisions

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[19] A/67/301, paras. 33–42.

[20] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, judgement of 31 August 2001 (Series C, No. 79).

[21] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community* v. *Paraguay*, judgement of 17 June 2005 (Series C, No. 125) para. 51.

[22] African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, 276/2003 (2010), para. 241.

[23] Ibid., para. 246.

[24] See articles 11, 18, 19, and 32.

that would affect the lands and territories of indigenous peoples, including the classification of their lands as cultural or natural heritage sites.

36. The principle of free, prior and informed consent is a key element of human rights jurisprudence. The Committee on Economic, Social and Cultural Rights calls on States to "respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights",[25] and has also put great emphasis on such consent in the context of their cultural heritage.[26] The Human Rights Committee, in several concluding observations, has highlighted that it is essential for States to ensure the participation of indigenous peoples in decision-making processes that would affect their cultural rights, stressing the need to seek their consent on all matters affecting them.[27]

37. The Special Rapporteur in the field of cultural rights has underlined that the participation of individuals and communities in cultural heritage matters is crucial and that, the power differentials that exist between, as well as within, communities must be taken into consideration, as they impact the ability of individuals and groups to effectively contribute to the identification, development and interpretation of what should be considered as a common "culture" or shared cultural heritage. She considered that it was also important to fully respect the freedom of individuals to participate or not in one or several communities, to develop their multiple identities, to access their cultural heritage as well as that of others, and to contribute to the creation of culture, including through the contestation of dominant norms and values within the communities they belong to as well as those of other communities.[28] In this respect, particular attention should be paid to the position of women within indigenous communities, and States should ensure that diverse women's voices within specific communities are heard and that their human rights are not sacrificed in the name of culture.[29]

A. Participation at the international level

38. Since the adoption of the Declaration, there have been repeated complaints by indigenous peoples and human rights organizations about violations of the rights of indigenous peoples in the implementation of the World Heritage Convention.[30] There is no procedure to ensure the participation of indigenous peoples in the nomination and management of World Heritage sites nor is there a policy to ensure their free, prior and informed consent to the nomination of such sites.[31] Both the Permanent Forum on Indigenous Issues and the Expert Mechanism have addressed the issues of consent and participation and have emphasized the importance of obtaining the free, prior and informed consent of indigenous peoples with regard to territories proposed for nomination and inscription as World Heritage sites. The Expert Mechanism also noted that "robust procedures and mechanisms should be established to ensure indigenous peoples are

[25] See the Committee's general comment No. 21 (2009), para. 37.

[26] E/C.12/TZA/CO/1-3, para. 29.

[27] CCPR/C/PAN/CO/3, para. 21, CCPR/C/KEN/CO/3, para. 24, and Communication No. 1457/2006, *Poma Poma* v. *Peru*, Views adopted on 27 March 2009.

[28] A/HRC/17/38, para. 10.

[29] A/67/287, para. 80.

[30] E/2010/43-E/C.19/2010/15, para. 131, Expert Mechanism Advice No. 2 (2011) (A/HRC/18/42, annex), para. 38, and Letter from the Special Rapporteur on the rights of indigenous peoples to the Director of the World Heritage Centre (A/HRC/25/74, p. 127).

[31] "World Heritage and Indigenous Peoples — A Call to Action", Report of the International Expert Workshop on the World Heritage Convention and Indigenous Peoples (Copenhagen, 20-21 September 2012), p. 60.

adequately consulted and involved in the management and protection of World Heritage sites".[32]

39. The Special Rapporteur in the field of cultural rights also recommended that States seek the free, prior and informed consent of source communities before adopting measures concerning their specific cultural heritage, in particular in the case of indigenous peoples, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples. She specifically emphasized that no inscription on UNESCO lists relating to cultural heritage or national lists or registers should be requested or granted without the free, prior and informed consent of the concerned communities.[33]

40. In 2011, the African Commission on Human and Peoples' Rights adopted a resolution condemning the inscription of Lake Bogoria National Reserve in Kenya on the World Heritage List, as the World Heritage Committee had failed to respect the rights of the Endorois community.[34] In the resolution, the African Commission noted that many sites "have been inscribed without the free, prior and informed consent of the indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples." The resolution drew attention to the general lack of respect for the rights of indigenous peoples in the context of nomination of World Heritage sites.

41. The International Union for the Conservation of Nature World Conservation Congress adopted a resolution calling on the World Heritage Committee to review and revise its procedures in consultation with indigenous peoples to ensure that their rights are upheld and implemented in the management and protection of existing World Heritage sites. The aim of the resolution is to make the decision-making process consistent with the principles and goals of the Declaration on the Rights of Indigenous Peoples and to ensure that no World Heritage sites are established in the territories of indigenous peoples without their free, prior and informed consent."[35]

42. International Finance Corporation Performance standard 7 on indigenous peoples states that "where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples' lives, priority will be given to the avoidance of such impacts. Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples." (para. 16) The adoption of that standard by a Corporation that plays an important role in supporting investments globally is very significant and indicates that human rights obligations are not limited to the public sector. Nonetheless, it has been widely observed that the requirements of participation and consultation, and in particular the requirement to obtain the free, prior and informed consent of indigenous peoples, are not yet properly implemented and respected at the international level.

43. Some questions have also been raised with regard to the rights of women in the implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The Special Rapporteur in the field of cultural rights stressed that article 13 (d) (ii) of the Convention, according to which access to cultural heritage should be ensured "while respecting customary practices governing access to specific aspects of such

[32] A/HRC/21/53, annex, para. 38.

[33] A/HRC/17/38, para. 80.

[34] Resolution No. 197 on Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site.

[35] Resolution WCC-2012-Res-047 on Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in the context of the UNESCO World Heritage Convention.

heritage", cannot be interpreted as permitting gender-based discrimination. It is essential to ensure that distinctions do not lead to indirect or structural discrimination against women and girls.[36]

44. Since its inception, the WIPO Intergovernmental Committee has been trying to support an inclusive approach to promote the direct involvement of all stakeholders, especially indigenous peoples and local communities. During all its sessions, indigenous peoples may intervene on any issue on the agenda and make drafting proposals, which could be incorporated into the text under discussion if supported by at least one member State. In 2005, the WIPO General Assembly established a WIPO voluntary fund to facilitate the participation of accredited indigenous peoples and local communities. Through this mechanism, representatives of more than 80 indigenous peoples and local communities worldwide have received funding to participate in sessions of the Intergovernmental Committee.

B. Participation at the national level

45. In its general comment No. 21, the Committee on Economic, Social and Cultural Rights emphasized that States had an obligation to allow and encourage the participation of indigenous peoples in the design and implementation of laws and policies that affect them.[37] In particular, States parties should obtain their free, prior and informed consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk. States have a duty to obtain the consent of indigenous peoples in relation to decisions that are of fundamental importance for their rights, including decisions to classify their territories under the label of Cultural or Natural Heritage Sites.

46. The Special Rapporteur in the field of cultural rights has stressed that concerned communities and relevant individuals should be consulted and be able to actively participate in the process of identification, selection, classification, interpretation, preservation/safeguard, stewardship and development of cultural heritage. Furthermore, States have the duty not to destroy, damage or alter cultural heritage, at least not without the free, prior and informed consent of concerned communities, and to take measures to preserve/safeguard cultural heritage from destruction or damage by third parties.[38]

47. Indigenous peoples in Canada are actively involved in the protection of their cultural heritage and have been supported by formal legislation in this area. For example, the Province of British Columbia enacted the Heritage Conservation Act of 1996, which was created in order "to encourage and facilitate the protection and conservation of heritage property in British Columbia." That includes ensuring that indigenous peoples are consulted on the status of cultural heritage sites and objects within their traditional lands and territories. Another positive example is the recent nomination of Pimachiowin Aki as a World Heritage site, a joint effort of two Canadian provinces and the First Nations.[39]

48. In the United States of America, the 1992 designation of Taos Pueblo as a World Heritage site was based on a joint proposal of the Taos Pueblo Tribal Council and the

[36] A/67/287, para. 63.
[37] See the Committee's general comment No. 21 (2009), para. 55(e).
[38] A/67/287, para. 79 (b) and (c).
[39] Submission: International Work Group for Indigenous Affairs and Forest Peoples Programme.

United States Government, and an Executive Order on Consultation and Coordination with Indian Tribal Governments entered into force on 6 November 2000.[40]

49. The Australian National Committee of the International Council on Monuments and Sites adopted the Burra Charter for Places of Cultural Significance (2013) as a best practice cultural heritage conservation and management guide. The conservation principles set out in the Burra Charter form the basis for management of all places of cultural significance in Australia. The Charter establishes appropriate decision-making procedures and ensures the participation and inclusion of cultural groups that will be affected by the decisions.[41]

50. The 2012 Free, Prior and Informed Consent Guidelines of the National Commission on Indigenous Peoples of the Philippines mentions sacred grounds, burial sites and cultural and heritage sites as areas excluded for any activity except for exclusive purposes where they are identified. However, it seems that its implementation remains a huge challenge, owing to the manipulation of the process by interested parties.[42]

51. The indigenous peoples of the States of the Caribbean Community (CARICOM) participated in the creation of a draft CARICOM Regional Framework, which seeks to establish a legal regional instrument for the protection of genetic resources, traditional knowledge and traditional cultural expressions, while ensuring that they are accessed with the free, prior and informed consent of the rightful owners/holders/beneficiaries on mutually agreed terms and that the owners/holders/beneficiaries receive fair and equitable benefit sharing.[43]

52. However, while there is some good practice emerging at national level, there are still many instances where indigenous peoples have not been allowed to participate in decision-making processes that affect their cultural heritage.[44] For example, in 2011, both the Western Ghats (India) and the Sangha Trinational (Congo/Cameroon/Central African Republic) were inscribed as natural World Heritage sites, despite the fact that in both situations, serious objections were raised about the lack of any meaningful involvement or participation of indigenous peoples living in the respective areas. In both cases, there was a blatant lack of respect for the free, prior and informed consent of the concerned communities, as the affected indigenous peoples had not even seen the submitted nomination documents, which had not been made publicly available.[45]

V. Specific issues relating to the rights of indigenous peoples with respect to their cultural heritage

A. Lands, territories and cultural heritage

53. Access to and use of lands, territories and the environment are essential elements of cultural heritage for many indigenous peoples. The Inter-American Court of Human Rights stated that "any denial of the enjoyment or exercise of their territorial rights is detrimental

[40] United States Government, Office of the President, Executive Order 13175 (2000).
[41] Submission, Australia.
[42] Submission, Asia Indigenous Peoples Pact.
[43] Submission, The ALDET Centre-Saint Lucia.
[44] S. Disko and H. Tugendhat (eds.), *World Heritage Sites and Indigenous Peoples' Rights* (International Work Group for Indigenous Affairs Document No. 129, 2014).
[45] Joint statement on continuous violations of the principle of free, prior and informed consent in the context of UNESCO's World Heritage Convention, endorsed by over 70 Indigenous organizations and NGOs, submitted to the World Heritage Committee in May 2011.

to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations."[46] As already stated, the connection between land rights and cultural heritage is strongly embedded in international legal instruments and in international jurisprudence. Many human rights institutions have highlighted that ownership, control and management of their ancestral territories constitutes an essential element of the cultural heritage of indigenous peoples.[47] The Committee on Economic, Social and Cultural Rights calls on States to "respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life."[48]

54. Both the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights have given prominence to the importance of land and territorial rights in their decisions, emphasizing that land rights constitute a foundation for the cultural integrity of indigenous peoples, including their rights to culture, religion, health, development and natural resources.[49] An important aspect of such approach relates to the recognition of the spiritual value that indigenous peoples attach to their territories as part of their cultural heritage. The protection of sacred sites is a key element of indigenous peoples' territorial rights, and therefore of their cultural heritage.

55. Lack of recognition of indigenous peoples' land rights negatively affects their right to enjoy, access and promote their cultural heritage. As such, no policy or legislation can adequately address the cultural heritage of indigenous peoples without recognizing their fundamental rights to their lands and territories.

56. The establishment of World Heritage sites, or other forms of protected areas, often has a negative impact on indigenous peoples because, often, their ancestral rights over their lands and territories are not respected or protected. In many nature-protected areas, including areas inscribed on the World Heritage List, narrow restrictions are imposed on traditional practices and activities, such as hunting, gathering, farming or animal husbandry, in violation of the cultural and subsistence rights of indigenous peoples. To be included on the World Heritage List, sites must be of "outstanding universal value", a concept which can lead to management frameworks that prioritize the protection of those heritage aspects at the expense of the land rights of indigenous peoples or one specific interpretation of the site to the detriment of other interpretations. As a result, the protection of world heritage can undermine indigenous peoples' relationship with their traditional lands, territories and resources, as well as their livelihoods and cultural heritage, especially in sites where the natural values are deemed to be of outstanding universal value but the cultural values of indigenous peoples are not taken into account.

57. Non-State actors who invade indigenous peoples' territories often negatively impact the fundamental connection between land rights and cultural heritage. Extractive industries and other forms of industrial operations can result in profound, and often irreversible, damage to the cultural heritage of indigenous peoples. The Expert Mechanism noted the

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[46] See the case of *Yakye Axa Indigenous Community* v. *Paraguay*, para. 203 (see footnote 21).

[47] Jeremie Gilbert, "Indigenous Peoples' Heritage and Human Rights", S. Disko and H. Tugendhat (eds.), *World Heritage Sites and Indigenous Peoples' Rights* (see footnote 44).

[48] General comment No. 21 (2009), para. 49 (d).

[49] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, para. 149 (see footnote 20), and African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, para. 16 (see footnote 22).

urgent need to protect indigenous natural heritage from the operations of extractive industries, to clarify ownership of natural heritage, and to recognize indigenous peoples' substantive rights to self-determination.[50]

B. Traditional knowledge, intellectual property and cultural heritage

58. Traditional knowledge can be understood as a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural and spiritual identity. It encompasses knowledge, know-how, skills, innovations and practices. Traditional knowledge also encompasses traditional cultural expressions or expressions of folklore. These can be, for example, dances, songs, handicrafts, designs, ceremonies, tales, or other artistic or cultural expressions. Intellectual property protection could make it possible to protect traditional remedies and indigenous crafts and music against misappropriation and enable communities to control and benefit collectively from their commercial exploitation.

59. In recent years, indigenous peoples, local communities as well as governments, mainly in developing countries, have demanded intellectual property protection for traditional forms of creativity and innovation. Innovations based on traditional knowledge, such as in traditional medicines, sacred laws and spiritual nature laws, may benefit from patent, trademark and geographical indication protection or may be protected as a trade secret or confidential information.[51] Indigenous peoples have expressed concern that existing international mechanisms to protect intellectual property are inadequate. They note that the intellectual property system focuses on protecting the intellectual property of individuals, rather than collectivities, and views intellectual property as alienable, which are not consistent with indigenous peoples' laws and policies related to their knowledge.[52] Furthermore, indigenous peoples reject the "public domain" status of traditional knowledge and traditional cultural expressions and argue that it opens them up to misappropriation and misuse.

C. Tourism and cultural heritage

60. Cultural heritage has acquired enormous economic value as one of the mainstays of the tourism industry, often negatively impacting the rights of indigenous peoples. The inscription of sites on the World Heritage List is usually a catalyst for rapid tourism development. However, indigenous peoples rarely benefit from the often large-scale developments on their territories.

61. The Ngorongoro Conservation Area in Tanzania, which is classified as a World Natural Heritage site and constitutes a key tourism destination, provides very little benefit to the indigenous peoples of the area.[53] Pastoralist organizations have urged the Government to ensure that the income accruing from tourism in the area is distributed equally. This is certainly not an isolated situation. It is essential that benefit-sharing mechanisms be established in cases of tourism development on indigenous territories.

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[50] A/HRC/21/55.

[51] Council on Aboriginal Issues, *Elder Protocol and Guidelines* (Canada, University of Alberta,2012).

[52] A/HRC/21/53, para. 62.

[53] W. Olenasha, "A World Heritage Site in the Ngorongoro Conservation Area", S. Disko and H. Tugendhat (eds.), *World Heritage Sites and Indigenous Peoples' Rights*, p. 214 (see footnote 44).

62. Misappropriation of the cultural heritage of indigenous peoples by the tourism industry is another issue. For example, the Saami costume, which is the symbol of the cultural heritage of the Saami people, is misused in many ways by the tourism industry in Finland. Gift shops often sell handicrafts with Saami designs that are not produced by indigenous crafters or use traditional Saami styles and colours in products that are in no way related to Saami culture. Imitations of the Saami costume are also often misused in tourism as employees' uniforms.[54] Such misappropriation of indigenous peoples' cultural heritage by the tourism industry has detrimental effects on their identity and self-image. It is important that States monitor the tourism industry to ensure the protection of the cultural heritage of indigenous peoples.

D. Traditional sports and games

63. Sports and traditional games have been recognized as integral parts of the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as affirmed in article 31 of the Declaration.

64. The benefits and value of sports and traditional games are outlined in the Convention on the Rights of the Child, and are an important component to ensuring that indigenous peoples are able to freely determine and pursue their cultural development as part of their right to self-determination, as set out in articles 3 and 5 of the Declaration.

65. The Mato Grosso Declaration, adopted at the Second International Sports Congress held in Mato Grosso, Brazil, from 9 to 16 November, called on States and governments to join indigenous peoples in partnership and mutual respect in implementing their right to self-determination through sports and traditional games as well as the manifestations of their traditional knowledge and cultural expressions.[55]

VI. Cultural appropriation, restitution and repatriation

A. Cultural misappropriation and interpretation

66. Many indigenous peoples are affected by the misappropriation of their cultural heritage, which may take many forms, including commodification; the use of indigenous peoples' imagery and symbols by marketing or commercial firms; and the misappropriation of traditional songs. A recent settlement included the requirement to recognize the indigenous composer of the Maori *haka* (tribal war dance) whenever it is used in public or commercial situations.[56]

67. Cultural misinterpretation is another issue that negatively impacts the cultural heritage of indigenous peoples. This occurs when interpretation or visitor centres, interpretive signage, information brochures, guided tours or audio-guides on cultural or natural heritage sites do not provide correct information regarding indigenous peoples' cultural or natural heritage or do not reflect their particular interpretation of the cultural or natural heritage in question.

[54] Submission, Saami Parliamentary Council of Finland, and Presentation by Pia Nuorgam, Expert Seminar on Indigenous Peoples' Rights with Respect to their Cultural Heritage, 2015.

[55] A/HRC/EMRIP/2014/CRP.2, annex, para. 2.

[56] Submission, New Zealand Human Rights Commission.

68. Cultural misappropriation is also an issue in museums and their representation of indigenous cultures. Museums are regarded as a source of education and cultural understandings. In particular, museums provide an important space for displaying artefacts and objects that represent particular events and the relationship between indigenous and non-indigenous peoples. For example, the National Museum of the American Indian and the Canadian Museum for Human Rights, among others, display original copies of treaties signed between the Government of Canada, the British Crown, the Government of the United States of America and indigenous peoples. The significance of those displays is the vital role of spirituality and the cultural ceremony of treaty-making. Museums are an important space for the promotion and appreciation of indigenous cultural heritage. The Sámi Museum Siida is an example of how museums that are managed by indigenous peoples themselves play a key role in the preservation, promotion, and transmission of cultural heritage.[57]

69. However, museums often contribute to the misappropriation of the cultural heritage of indigenous peoples. Many museums, both private and public, hold and display the cultural heritage of indigenous peoples without the consent of the peoples concerned. For example, the Swedish National Museum of Ethnography currently holds a ceremonial deer head (*Maaso Kovat*), a sacred item of the highest spiritual and cultural significance for the Yaqui Nation, and which is used in the Yaqui Deer Dance ceremony. Despite many official requests for restitution, the museum authorities have refused to return the deer head.[58] Unfortunately, this is not an isolated situation. Many cultural items and human remains of indigenous peoples are held by public museums and by private collectors worldwide, and without the free, prior and informed consent of the peoples concerned.

B. Restitution and repatriation

70. The right to redress and restitution where violations of the rights of indigenous peoples have occurred is a foundational element to ensuring reconciliation and the future commitment to protecting the rights of indigenous peoples. Under human rights law, there is a very strong principle in favour of restitution when a violation has occurred. The Declaration affirms that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs" (art. 11).

71. The establishment and management of protected cultural heritage sites have often resulted in indigenous peoples' dispossession of and alienation from their traditional lands and resources. In such cases, indigenous peoples are entitled to restitution of their ancestral lands. The right to restitution of land and territories which have been acquired without their consent constitutes a key component of indigenous peoples' rights.[59]

72. The repatriation of the cultural heritage of indigenous peoples is an important aspect of such restitution. The ancient burial grounds of many indigenous communities have been disrespected and the communities concerned have asked for the repatriation of human remains and sacred and cultural objects, whether held in private or public collections.[60] The

[57] Presentations by Parvi Magga and Ilja Ojanlatva, Expert Seminar on Indigenous Peoples' Rights with Respect to their Cultural Heritage, 2015.

[58] Submission, International Indian Treaty Council.

[59] Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997), para. 5.

[60] Submission, International Repatriation Project.

General Assembly affirmed and recognized the importance of repatriating indigenous peoples' ceremonial objects and human remains.[61]

73. Although some potential avenues for redress or protection might exist in legal terms, notably via the International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects (2005), in reality it is extremely difficult for indigenous peoples to receive proper protection and reparation when their cultural heritage, in particular intangible heritage, is misappropriated. While the role of public authorities is crucial to ensuring such repatriation, the repatriation of ceremonial objects and human remains requires the cooperation of the places where the objects and remains are stored, such as museums.

74. Some legislation and policies stipulating repatriation of indigenous peoples' cultural heritage exists. In 2011, the Australian government adopted a policy on indigenous repatriation which facilitates the return of Aboriginal and Torres Strait Islanders ancestral remains from overseas institutions to their communities of origin. To date, this programme has facilitated the return of over 1,400 ancestral remains and over 1,400 sacred objects from within Australian collections, and brought home more than 1,200 ancestral remains to Australia from overseas.[62] Other examples include the Native American Grave Protection and Repatriation Act and the National Museum of the American Indian Act in the United States.[63] In Canada, the First Nations Sacred Ceremonial Objects Repatriation Act creates a mechanism by which cultural heritage sites and objects can be protected, preserved, and repatriated. However, as noted earlier, there are still numerous examples throughout the world where such repatriation is not respected and enforced.

C. Right to cultural revitalization

75. Article 11 of the Declaration states that "indigenous peoples have the right to practise and revitalize their cultural traditions and customs." During the Expert Seminar on Indigenous Peoples' Rights with Respect to their Cultural Heritage, many presentations highlighted how important the process of cultural revitalization is for the cultural heritage of indigenous peoples. Some positive examples of indigenous peoples taking the initiative to revitalize their cultural heritage exist, such as the activities leading to the revitalization of the Maori language, or the use of bilingual education programmes and radio to strengthen and revitalize indigenous languages in Mexico.[64]

76. The increasing recognition of food production systems and seeds as cultural heritage is another instance of cultural revitalization. In Guatemala, for example, corn is considered intangible cultural heritage due to its historical, cultural, and spiritual value.[65]

77. In terms of good practices, the Indigenous Rights Programme of the National Commission for the Development of Indigenous Peoples, in Mexico, has implemented a programme on cultural rights, which supports community-level initiatives to revitalize cultural heritage among indigenous peoples, including languages, music and traditional medicine. It has provided training to indigenous youth on the protection of cultural heritage. To date, the programme has supported 505 community initiatives.[66]

[61] General Assembly resolution 69/2, para. 27.
[62] Submission, Australia.
[63] Submission, Human Rights Advocates.
[64] Submissions, Cultural Survival and Mexico.
[65] Submission, Guatemala.
[66] Submission, Mexico.

Another important element relating to the revitalization of indigenous cultures is the recognition of indigenous women as active agents of transformation. Recent studies have demonstrated that indigenous women play an immense role in the revitalization and the transmission of the cosmovision and cultural heritage of indigenous peoples.[67]

[67] Submission, Comite de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres.

Annex

Expert Mechanism Advice No. 8 (2015): Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage

A. General

1. The cultural heritage of indigenous peoples is a holistic and inter-generational concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, the arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovision, laws and activities such as hunting, fishing, trapping and gathering.

2. The cultural heritage of indigenous peoples is comprised of all objects, sites, plants and animal species, customs and practices, expressions, beliefs and knowledge, the nature or use of which has been transmitted from generation to generation, and which are regarded as pertaining to a particular people or its territory.

3. The cultural heritage of indigenous peoples includes tangible and intangible manifestations of their ways of life, achievements and creativity, and should be considered an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources.

4. The right of access to and enjoyment of cultural heritage forms part of international human rights law and represents an important aspect of the rights of indigenous peoples, including the right to take part in cultural life, the right to enjoy their own culture and the right to self-determination. The right of indigenous peoples to self-determination implies their right to maintain, control, protect and develop their own cultural heritage.

5. The safeguard and development of the cultures of indigenous peoples require the protection of their lands, territories and resources. Cultural rights entail rights to land and natural resources, and imply an obligation to protect the cultural heritage of indigenous peoples through the recognition of their rights to own, control and manage their ancestral territories.

6. Heritage policies, programmes and activities affecting indigenous peoples should be based on full recognition of the inseparability of natural and cultural heritage, and the deep-seated interconnectedness of intangible cultural heritage and tangible cultural and natural heritage.

7. For indigenous peoples, cultural and natural values are inseparably interwoven and should be managed and protected in a holistic manner. It is imperative that all the instruments that derive from such regimes and relate to the cultural heritage of indigenous peoples are interpreted in the light of the United Nations Declaration on the Rights of

Indigenous Peoples, which is the most specific, representative and comprehensive document on indigenous cultural heritage.[58]

8. Indigenous peoples have the right to redress when their cultural heritage is wrongly misappropriated without their free, prior and informed consent. This includes a right to repatriation and restitution.

B. Advice for States

9. States should recognize the value and livelihood aspects of the cultural heritage of indigenous peoples. States should recognize that the cultural heritage of indigenous peoples is not limited to the protection of specific manifestations, symbols or objects, but also includes tangible and intangible manifestations of their ways of life, achievements and creativity, and of their spiritual and physical relationships with their lands, territories and resources.

10. Indigenous peoples should be consulted and enabled to actively participate in the whole process of identification, evaluation, classification, interpretation, preservation, safeguarding, monitoring, stewardship and development of their cultural and natural heritage.

11. States should re-visit the draft Principles and guidelines for the protection of the heritage of indigenous peoples,[59] with a view to possibly adopting them as an instrument to protect the cultural heritage of indigenous peoples.

12. In accordance with the United Nations Declaration on the Rights of Indigenous Peoples, States have the obligation to seek the free, prior and informed consent of indigenous peoples before adopting measures affecting their cultural or natural heritage. No inscription on lists of the United Nations Educational, Scientific and Cultural Organization (UNESCO) relating to the cultural or natural heritage of indigenous peoples or national lists or registers should be requested or granted without the free, prior and informed consent of the indigenous peoples concerned.

13. States need to legally recognize and protect the right of indigenous peoples to their lands, territories and resources through appropriate measures and policies, including declaring cultural heritage sites, sacred sites and other areas of spiritual significance to indigenous peoples as "no-go zones" for extractive industries, tourism development and other development project which have not received the free, prior and informed consent of the indigenous peoples concerned.

14. States need to harmonize their national legislations based on the provisions of the Declaration and taking note of the outcome document of the World Conference on Indigenous Peoples (General Assembly resolution 69/2), and should develop national action plans for the protection and promotion of the cultural heritage of indigenous peoples.

15. In the case of cross-border indigenous peoples, bordering States should ensure the protection of their cultural rights on an equal basis.

16. States should ensure that the benefits arising from the use of the lands, territories and resources of indigenous peoples' as World Heritage sites are defined by and genuinely accrue to the indigenous peoples concerned, in a fair and equitable manner.

[58] Presentations by Alexandra Xanthaki, Expert Seminar on Indigenous Peoples' Rights with Respect to their Cultural Heritage, held in Rovaniemi, Finland (26–27 February 2015).

[59] E/CN.4/Sub.2/1995/26, annex.

17. States should guarantee that indigenous peoples have available financial resources that effectively allow them to maintain, safeguard and protect their cultural heritage, including through the recognition of indigenous peoples' right to control and benefit from their natural resources, traditional knowledge and traditional cultural expressions.

18. States should provide measures for the revitalization and transmission of the cultural heritage of indigenous peoples in formal and informal education, including the promotion and protection of indigenous peoples' languages through effective mother tongue education for indigenous children.

19. States should take effective measures to assess, redress and remedy the effects of past injustices and violations of the rights of indigenous peoples by ensuring the restitution and repatriation of their cultural heritage.

20. States should increase their financial support to museums that are owned and managed by indigenous peoples, as part of the redress and repatriation process.

21. States should strengthen their legal and policy frameworks to encourage public and private museums to reach out to indigenous communities in order to better understand the impact of restoring stolen cultural heritage.

22. States should ensure that investors and corporations respect the cultural heritage of indigenous peoples. Businesses have a responsibility to protect the right to cultural heritage; if operations have a negative impact on the realisation of that right, businesses have a responsibility to remedy that impact.

23. States that have not already done so should ratify the Convention for the Safeguarding of the Intangible Cultural Heritage, as a measure to increase the protection afforded to indigenous peoples' intangible cultural heritage.

C. Advice for international organizations

24. There is a need for better coordination and collaboration between institutions and agencies of the United Nations system on matters relating to cultural heritage and its human rights dimensions so as to increase coherence and avoid duplication of work. This issue could be addressed in the system-wide action plan on indigenous peoples that is currently being developed, as requested by the General Assembly in the outcome document of the high-level plenary meeting known as the World Conference on Indigenous Peoples.

25. Relevant special procedures should monitor State policies on access to cultural heritage to ensure that they respect the principles of the Declaration and that States act in accordance with the provisions in the International Labour Organization Indigenous and Tribal Peoples Convention No. 169 that protect cultural heritage.

26. International organizations working in the field of cultural heritage, such as UNESCO, the World Intellectual Property Organization (WIPO) and other United Nations specialized agencies, need to integrate and respect the rights proclaimed in the Declaration in their work. This includes respect for the principle of free, prior and informed consent of indigenous peoples before any decision affecting their lands is taken.

27. The World Heritage Committee should take effective measures to ensure that the protection of World Heritage does not undermine indigenous peoples' relationship with their traditional lands, territories and resources, their livelihoods and their rights to protect, exercise and develop their cultural heritage and expressions.

28. The World Heritage Committee needs to review its current procedures and Operational Guidelines, with the full and effective participation of indigenous peoples, to

ensure that the implementation of the World Heritage Convention is consistent with the Declaration.

29. The World Heritage Committee should adopt changes to the criteria and regulations for the assessment of "outstanding universal value" so as to ensure that the values assigned to World Heritage sites by indigenous peoples are fully and consistently recognized as part of their outstanding universal value.

30. UNESCO and the World Heritage Committee should dedicate resources to the development of mechanisms to ensure that indigenous peoples can effectively participate in all World Heritage Convention processes affecting them and that their rights, priorities, values and needs are duly recognized, considered and reflected.

31. UNESCO should strengthen its efforts to finalize its Policy on Indigenous Peoples, in cooperation with indigenous peoples and the three United Nations mechanisms with specific mandates regarding the rights of indigenous peoples.

32. UNESCO should consider developing a charter on traditional sports and games that protects the cultural heritage of indigenous peoples in the area of traditional sports and games.

33. United Nations institutions should continue to develop guidelines and other norms and practices aimed at the protection and inclusion of traditional cultural heritage, including the role of traditional knowledge, in enhancing community resilience and sustainable development.

34. WIPO and its Intergovernmental Committee should ensure that indigenous peoples fully participate in the current negotiations and that their free, prior and informed consent is sought and obtained before any new international instruments for the protection of traditional knowledge is adopted. The process in which laws governing the use of traditional knowledge, cultural expressions and genetic resources are developed needs to conform with the rights guaranteed under the Declaration, in particular, article 31 thereof.

35. The Human Rights Council should consider calling for an immediate halt to any removal of ancestral remains and cultural items indigenous peoples for any reason, unless their free, prior and informed consent is obtained.

D. Advice for indigenous peoples

36. Indigenous peoples are the primary keepers of their cultural heritage. As such they have an active role to play in its preservation, transmission and revitalization.

37. Indigenous peoples should ensure the equal participation of women in discussions and decisions on cultural heritage at the level of the community.

38. Indigenous peoples should engage and take an active part in international fora related to the protection of cultural heritage, notably under the aegis of WIPO and UNESCO.

39. Indigenous peoples should participate in the practical Workshops for Indigenous Peoples and Local Communities on intellectual property, traditional knowledge and traditional cultural expressions that are organized by WIPO, which impart knowledge of the main principles of the intellectual property system, and explain, among other things, the rationale, objectives and methodology of the negotiations that are currently being conducted by the Intergovernmental Committee.

40. Indigenous peoples should participate actively to educate the non-indigenous population about the importance of the collective protection of the heritage of indigenous peoples.

41. Indigenous peoples should ensure the inter-generational transmission of their cultural heritage within their communities.

E. Advice for Museums

42. Museums and other places in which the cultural heritage of indigenous peoples is stored should inform the relevant indigenous peoples and develop mechanisms to facilitate the return of such cultural heritage when sought by the indigenous peoples concerned.